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21

22 UNITED STATES DISTRICT COURT

23

24 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

25

26 STATE OF CALIFORNIA, *et al.*,
27 Plaintiffs,
28 v.
18 WILBUR L. ROSS, JR., *et al.*,
19 Defendants.

20 CITY OF SAN JOSE, *et al.*,
21 Plaintiffs,
22 v.
23 WILBUR L. ROSS, JR., *et al.*,
24 Defendants.

Civil Action No. 3:18-cv-01865-RS and
Civil Action No. 3:18-cv-02279-RS

**DEFENDANTS' NOTICE OF MOTION
AND MOTION IN LIMINE TO
EXCLUDE TESTIMONY OF DR.
MATTHEW BARRETO PERTAINING
TO QUESTION 8 OF HIS SURVEY;
MEMORANDUM IN SUPPORT
THEREOF**

Dept.: 3
Judge: The Honorable Richard G. Seeborg
Trial Date: January 7, 2019
Action Filed: March 26, 2018

26 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**
27

28

PLEASE TAKE NOTICE that on Tuesday, January 8, 2019, at 9:00 a.m., or as soon thereafter as counsel may be heard, before The Honorable Richard Seeborg, in Courtroom 3, 17th Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, the defendants Wilbur L. Ross, Jr., Secretary of Commerce; U.S. Department of Commerce; Ron Jarmin, performing the nonexclusive functions and duties of Director, U.S. Census Bureau; and U.S. Census Bureau will move, and hereby do move, to exclude certain witness testimony and evidence at trial for the reasons set forth in the following Memorandum of Points and Authorities.

Dated: January 7, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director, Federal Programs Branch

CARLOTTA P. WELLS
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/s/ Carol Federighi
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Attorneys for Defendants

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION *IN LIMINE* TO
EXCLUDE TESTIMONY AND EVIDENCE OF DR. MATTHEW BARRETO
PERTAINING TO QUESTION 8 OF HIS SURVEY

Defendants respectfully request that the Court exclude under Federal Rule of Civil Procedure (“FRCP”) 37(c)(1) any testimony or evidence of Plaintiffs’ expert witness, Dr. Matthew Barreto, pertaining to Question 8 of his survey, for failure to properly disclose tables summarizing the results of this part of his survey, as required by FRCP 26(a)(2)(b) and FRCP 45. The reasons for this motion, as well as an explanation for why this motion is being filed after the deadline for filing motions *in limine*, are set forth further below. Plaintiffs’ counsel advise that they oppose this motion.

Procedural Background

1. On December 21, 2018, the same day that Defendants' motions *in limine* relating to the trial in this case were due, Plaintiffs served Defendants with a supplemental production purportedly pertaining to the testimony of Dr. Bernard Fraga, an expert scheduled to testify in only one of the above-captioned cases, *State of California v. Ross*, No. 18-1865. *See* Ex. A (email with attached document FRAGA_00566). This production consisted of two tables, labeled Tables 15 and 16, that appear to summarize data that Dr. Fraga had previously provided in an Excel spreadsheet. *Id.* Plaintiffs provided no further explanation for these tables, stating only that their failure to previously disclose them in connection with Dr. Fraga's testimony was inadvertent. *Id.*

2. Upon examination, Defendants' counsel eventually developed the suspicion that the tables were the work of another one of Plaintiffs' experts (in both of the above-captioned cases), Dr. Matthew Barreto, and not that of Dr. Fraga himself. Defendants' counsel subsequently queried Plaintiffs' counsel regarding the provenance of the tables and was advised that, in fact, "these tables originated from Dr. Barreto." Ex. B.

3. Tables 15 and 16 (FRAGA_00566) were not produced as part of Dr. Barreto's expert disclosure pursuant to Rule 26(a)(2)(B), which requires disclosure of "the facts or data considered by the witness in forming" his opinion. They also were not produced in response to a subpoena duces tecum served upon Dr. Barreto, which requested, *inter alia*, "[a]ll documents and

1 materials [Dr. Barreto] relied on, used, or considered in developing [his] opinions in this case.” Ex.
 2 C. If, as it appears, these tables were prepared by Dr. Barreto in developing his opinions here
 3 (notably, they are sequentially numbered to follow after the tables that are attached to his report, *see*
 4 Decl. of Matthew Barreto, ECF No. 99-12 in No. 18-1865, p. 73), they are “data” and “materials”
 5 that were “used” or “considered” by Dr. Barreto in drafting his report containing his opinions.
 6 Accordingly, they should have been included with Dr. Barreto’s subpoena response on October 3,
 7 2018.

8 **The Significance of FRAGA 00566 with Regard to Dr. Barreto’s Report**

9 4. In the course of developing his opinion in this case, Dr. Barreto designed and
 10 oversaw a public opinion survey intended to measure the impact of including a citizenship on the
 11 2020 census questionnaire on the self-response rates of various groups. As relevant here, that
 12 survey asked three questions. Question 1 (Q1) asked if respondents planned to participate in the
 13 census “and submit [their] household information,” without mentioning whether the census
 14 questionnaire would contain a citizenship question. Question 2 (Q2) asked those respondents who
 15 said yes to Q1 whether they would participate in the census “and submit [their] household
 16 information,” if the census questionnaire included a citizenship question. After a series of interim
 17 questions about trust and household composition, Question 8 (Q8) then asked those who had said
 18 yes to Q1 whether they would participate in the census “and fill out the 2020 Census form,” if the
 19 census questionnaire included a question on citizenship status and “if the government provides
 20 assurances that your information will be kept confidential and ONLY used for purposes of
 21 counting the total population and nothing more.” *See* Barreto Decl. ECF No. 99-12 in No. 18-
 22 1865, at 75-76.

23 5. According to Dr. Barreto, the purpose of Question 8 was to attempt to “mimic” the
 24 NRFU operations of the census “in the real world in a condensed telephone interview setting, by
 25 allowing some time to pass, and then asking the same subjects their willingness to participate a
 26 second or third time.” Barreto Decl., ECF No. 99-12 in No. 18-1865, at 41. Accordingly, from the
 27 rates of positive (Yes) responses to Q8 from among those respondents that said Yes to Q1 and
 28

1 then No to Q2, Dr. Barreto made some conclusions about the predicted effect of non-response
 2 follow-up (“NRFU”) in the 2020 census. Specifically, he concluded, based on the differences in
 3 response to Q8 among respondents in different states, that “the presence of a citizenship question
 4 will result in a NRFU success rate that is 54.6% lower in California, than if no citizenship question
 5 was asked.” *Id.* at 54.

6. The newly disclosed tables (FRAGA_00166) reveal new information not included in
 7 Dr. Barreto’s report about the results from the Q8 test, specifically, a breakdown in responses by
 8 demographic group for California and for non-California respondents. This breakdown shows
 9 strange anomalies in the results that may cast doubt on the reliability of Dr. Barreto’s interpretation
 10 and of the survey itself. For example, in California, 20% of whites answered Yes to Q8 after
 11 answering No to Q2 while, outside of California, 54% of whites said Yes to Q8 after answering No
 12 to Q2. Ex. A. As another example, 14% of non-Latinos in California answered Yes to Q8 after
 13 answering No to Q2 while 44% of Latinos in California said Yes to Q8 after answering No to Q2.
 14 *Id.*

15 Plaintiffs’ Failure to Disclose Was not Harmless

7. FRCP 37(c)(1) says that “[i]f a party fails to provide information or identify a
 16 witness as required by Rule 26(a)..., the party is not allowed to use that information or witness to
 17 supply evidence ... at a trial, unless the failure was substantially justified or is harmless.” This
 18 exclusionary sanction is ““self-executing”” and ““automatic.”” *Goodman v. Staples The Office Superstore,*
 19 *LLC*, 644 F.3d 817, 827 (9th Cir. 2011) (quoting *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d
 20 1101, 1106 (9th Cir. 2001)). Rule 37 “gives teeth” to Rule 26’s disclosure requirements and thus
 21 gives parties “a strong inducement for disclosure.” *Goodman*, 644 F.3d at 827. “[T]he burden is on
 22 the party facing sanctions to prove harmlessness.” *Yeti by Molly, Ltd.*, 259 F.3d at 1107.

8. Plaintiffs cannot establish that their failure to disclose the tables was harmless here.
 23 Because these tables were not included with Dr. Barreto’s disclosures, Defendants did not have a
 24 chance to question Dr. Barreto about these anomalies at his deposition in October or to re-open
 25 his deposition later. They therefore have been deprived of the opportunity to flesh out what may
 26

1 be a significant flaw in Dr. Barreto's survey. This material, and any conclusions drawn therefrom,
 2 therefore should be excluded. *See Underpinning & Found. Skanska, Inc. v. Travelers Cas. & Sur. Co.*,
 3 726 F. Supp. 2d 339, 349 (S.D.N.Y. 2010) (precluding undisclosed evidence where no explanation
 4 for failure provided, discovery closed in three-year old litigation, opposing party did not have
 5 opportunity to depose witness on evidence, and opposing party was prejudiced).

6 9. This harm from the nondisclosure of the tables is not vitiated by the possibility that
 7 Defendants may have been provided with the response data from the survey in "raw" form in
 8 various data files served as part of Dr. Barreto's disclosures. Defendants were never able to open
 9 those files, as Plaintiffs were well aware, and, in any event, Rule 26 and the subpoena require
 10 production of *all* materials and documents considered by Dr. Barreto and not just one version of
 11 material that may exist in several different formats or documents.

12 10. It also is not sufficient to rebut the evidence of prejudice that Plaintiffs did provide
 13 the tables on December 21 (less than three weeks before trial) as part of Dr. Fraga's expert
 14 disclosures. The timing of this disclosure cannot be considered remotely sufficient to enable
 15 Defendants to follow up in view of the two national holidays intervening between December 21
 16 and the trial date of January 7. In any event, the materials were not identified as having originated
 17 with *Dr. Barreto* until Defendants' counsel specifically questioned Plaintiffs about the provenance of
 18 the tables on January 5, 2019, after Defendants' counsel came to that conclusion on her own.
 19 Therefore, it was not until January 5 that Defendants were able to finally marry up the tables with
 20 the expert's analysis (Dr. Barreto) to which they are most pertinent. This sequence of events also
 21 explains why the present motion is being filed out of time.

22 11. For similar reasons, it is of no moment that Dr. Fraga testified in his deposition that
 23 it was "possible" that Dr. Barreto had tables that were not included in his appendix. *See* Ex. D. As
 24 Dr. Fraga also indicated in the deposition, the data he relied on had been provided in his own
 25 disclosures (*see* Ex. B) so there was no need for counsel to resolve the offhand reference to the
 26 "possibility" of additional Barreto tables. And Dr. Fraga's table does not reference Dr. Barreto so

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1 it was not at all clear until recently that the data in that table, and whatever anomalies it revealed,
2 originated with Dr. Barreto.

3 **Conclusion**

4 For the foregoing reasons, the Court should consider this untimely motion *in limine* and
5 should grant Defendants' motion and exclude all testimony and evidence of Dr. Barreto pertaining
6 to question 8 of his survey and to any results from that question.

7 Dated: January 7, 2019

Respectfully submitted,

8 JOSEPH H. HUNT
9 Assistant Attorney General

10 BRETT A. SHUMATE
11 Deputy Assistant Attorney General

12 JOHN R. GRIFFITHS
13 Director, Federal Programs Branch

14 CARLOTTA P. WELLS
15 Assistant Branch Director

16 /s/Carol Federighi
17 MARSHA STELSON EDNEY
18 Senior Trial Counsel
19 KATE BAILEY
20 CAROL FEDERIGHI
21 Trial Attorneys
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26 Tel: (202) 514-1903
27 Email: carol.federighi@usdoj.gov

28 *Attorneys for Defendants*

EXHIBIT A

From: [Gabrielle Boutin](#)
To: [Bailey, Kate \(CIV\)](#); [Federighi, Carol \(CIV\)](#); [Ehrlich, Stephen \(CIV\)](#); [Wells, Carlotta \(CIV\)](#); [Edney, Marsha \(CIV\)](#); [Yeomans, Keith A.](#)
Cc: [Matthew Wise](#); [Todd Grabarsky](#)
Subject: State of California v. Ross - supplemental Fraga production document
Date: Friday, December 21, 2018 12:47:58 PM
Attachments: [FRAGA_00566.pdf](#)

Kate,

Please find attached a supplemental production document from Dr. Fraga that we inadvertently did not previously produce. Please note that all of the data in the document was previously disclosed in Fraga production document "FRAGA 00237_ResponseRates_Scenario2_NRFU.csv."

Regards,

Brie

Gabrielle D. Boutin
Deputy Attorney General
California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6053
E-mail: Gabrielle.Boutin@doj.ca.gov

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Table 15: Percent who said Yes on Q8 if Q1=Yes & Q2=No – California

	Estimate	SE	Lower	Upper
Full Sample	0.2966409	0.0615155	0.1760705	0.4172112
Non-Latino	0.1418026	0.0561966	0.0316572	0.2519479
Latino	0.4370638	0.1014250	0.2382709	0.6358567
Foreign Born	0.4479022	0.1062351	0.2396814	0.6561230
US Born	0.4279232	0.1706387	0.0934714	0.7623750
Asian	0.0000000	0.0000000	0.0000000	0.0000000
Foreign Born	0.0000000	0.0000000	0.0000000	0.0000000
US Born	0.0000000	0.0000000	0.0000000	0.0000000
Black	0.2966409	0.0615155	0.1760705	0.4172112
White	0.1993841	0.0767383	0.0489771	0.3497912
Other	0.0026199	0.0024402	-0.0021629	0.0074027

Table 16: Percent who said Yes on Q8 if Q1=Yes & Q2=No – Non-California

	Estimate	SE	Lower	Upper
Full Sample	0.4928965	0.0594801	0.3763156	0.6094775
Non-Latino	0.5365985	0.0696079	0.4001670	0.6730300
Latino	0.3634638	0.1027854	0.1620045	0.5649231
Foreign Born	0.4730633	0.1732567	0.1334801	0.8126465
US Born	0.3216129	0.1295335	0.0677272	0.5754985
Asian	0.0021907	0.0031198	-0.0039241	0.0083055
Foreign Born	0.0039901	0.0630410	-0.1195703	0.1275505
US Born	0.0000000	0.0000000	0.0000000	0.0000000
Black	0.6215541	0.1749581	0.2786363	0.9644719
White	0.5464857	0.0717276	0.4058996	0.6870719
Other	0.7475773	0.4322288	-0.0995912	1.5947458

EXHIBIT B

From: [Gabrielle Boutin](#)
To: [Bailey, Kate \(CIV\)](#); [Matthew Wise](#)
Cc: [Federighi, Carol \(CIV\)](#); [Edney, Marsha \(CIV\)](#); [Wells, Carlotta \(CIV\)](#); [Libby, John](#); [Rosenberg, Ezra](#); [Guardado, Ana](#); [Case, Andrew](#); [Yeomans, Keith A.](#); [Noreen Skelly](#)
Subject: RE: Supplemental document production on 12/21
Date: Saturday, January 05, 2019 11:38:19 AM

Yes, these tables originated from Dr. Barreto. Carol can confirm that at Dr. Fraga's deposition, he identified the tables he used from Dr. Barreto, and that it was determined that this table had not been included in Dr. Barreto's report (and that Dr. Fraga had nevertheless produced in his own production a spreadsheet with the same figures).

From: Bailey, Kate (CIV) <Kate.Bailey@usdoj.gov>
Sent: Friday, January 04, 2019 2:39 PM
To: Matthew Wise <Matthew.Wise@doj.ca.gov>
Cc: Federighi, Carol (CIV) <Carol.Federighi@usdoj.gov>; Edney, Marsha (CIV) <Marsha.Edney@usdoj.gov>; Wells, Carlotta (CIV) <Carlotta.Wells@usdoj.gov>; Libby, John <jlibby@manatt.com>; Rosenberg, Ezra <erosenberg@lawyerscommittee.org>; Guardado, Ana <AGuardado@manatt.com>; Case, Andrew <ACase@manatt.com>; Yeomans, Keith A. <kyeomans@dwkesq.com>; Gabrielle Boutin <Gabrielle.Boutin@doj.ca.gov>; Noreen Skelly <Noreen.Skelly@doj.ca.gov>
Subject: Supplemental document production on 12/21

Counsel,

Attached is a file you provided to us on December 21 as a document relied upon by Dr. Fraga and inadvertently omitted from your earlier production of materials in response to our subpoena. Can you please advise as to where this document comes from? It appears to be data from Dr. Barreto's survey; indeed, the table numbers correspond sequentially to the last tables included in Dr. Barreto's expert report, but the tables were neither included in his report nor the documents produced in response to our subpoena to Dr. Barreto. Can you please confirm whether these tables did, in fact, originate with Dr. Barreto, and if not, where they came from?

Thank you,

Kate Bailey
Trial Attorney
United States Department of Justice
Civil Division – Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005
202.514.9239 | kate.bailey@usdoj.gov

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recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

EXHIBIT C

UNITED STATES DISTRICT COURT
for the
Northern District of California

State of California, et al., _____
 Plaintiff _____
 v. _____
 Wilbur L. Ross, Jr., et al., _____
 Defendant _____

Civil Action No. 3:18-cv-01865 & 5:18-cv-02279

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To:

Matthew A. Barreto

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A

Place: U.S. Attorney's Office, Central Dist. of Cal., 312 N. Spring St., Ste. 1200, Los Angeles, CA 90012, or by email or mail to undersigned counsel	Date and Time: 09/28/2018 10:00 am
---	---------------------------------------

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
--------	----------------

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/24/2018

CLERK OF COURT

OR

s/ Garrett Coyle

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Defendants
U.S. Department of Commerce et al. _____, who issues or requests this subpoena, are:

Garrett Coyle, 1100 L Street NW, Washington, DC 20005; garrett.coyle@usdoj.gov; (202) 616-8016

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:18-cv-01865 & 5:18-cv-02279

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any) _____

on (date) _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

on (date) _____ ; or

I returned the subpoena unexecuted because: _____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

Attachment A

1. All documents and materials you relied on, used, or considered in developing your opinions in this case;
2. all professional or scientific literature, studies, or memoranda supporting any of the opinions you intend to offer at trial;
3. all documents identifying your fee for services rendered in this case;
4. all documents describing your time spent developing opinions in this case, including, but not limited to, all invoices, statements, and bills regarding services rendered in this case;
5. all books, papers, articles, treatises, or other publications you have authored; and
6. a current copy of your curriculum vitae.

EXHIBIT D

In the Matter Of:

STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

3:18-cv-01865 and 5:18-cv-02279

BERNARD L. FRAGA, PH.D.

October 17, 2018



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BERNARD L. FRAGA, PH.D.
STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

October 17, 2018

1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs, CASE NO.
vs. 3:18-cv-01865 and
5:18-cv-02279

WILBUR L. ROSS, JR., et al.,

Defendants.

The deposition upon oral examination of BERNARD L. FRAGA, Ph.D., a witness produced and sworn before me, Paula A. Morgan, Notary Public in and for the County of Hamilton, State of Indiana, taken on the 17th day of October, 2018, in the United States Attorney's Office, 10 West Market Street, Suite 2100, Indianapolis, Marion County, Indiana, pursuant to the Federal Rules of Civil Procedure. This deposition was taken on behalf of the Defendants in the above-captioned matter.

BERNARD L. FRAGA, PH.D.
STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

October 17, 2018

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1 recreate what you --

2 A Just a moment. I'm finding the specific part of my
3 report. I believe it's earlier on I outline, quite
4 specifically, what I do to form Scenario B. Yes, in
5 Section 5.12, page 12, I describe Scenario B.6 Q Right. Correct. But where did you get the numbers
7 that you used for Scenario B? I don't think it says
8 in your report, so I'm just asking if you can
9 recollect where it came from.

10 A Those numbers were also provided by Dr. Barreto.

11 MS. BOUTIN: Do you want to know which table?

12 Q Yes. If you can identify a particular table, that
13 would be helpful.14 A So, again, I haven't reviewed the entire report,
15 but -- and I don't have the table directly in front
16 of me.17 Q So it's possible it was a different table that's not
18 included in his appendix that he provided you?19 A It's possible. But to clarify that comment, the
20 figures that were used, the table and the results
21 that were used, were provided in my -- in the
22 materials I provided along with the report.23 Q That may be -- I was maybe not able to isolate it, so
24 I will take another look at that. Thank you.

25 A Sure.

BERNARD L. FRAGA, PH.D.
STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

October 17, 2018

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1 STATE OF INDIANA)
2) SS:
3 COUNTY OF HAMILTON)4 I, Paula A. Morgan, Notary Public in Hamilton
5 County, Indiana, do hereby certify that the deponent
6 was, by me, sworn to tell the truth in the
7 aforementioned matter;8 That the deposition was taken on behalf of the
9 Defendants at the time and place heretofore mentioned
10 with counsel present as noted;11 That the deposition was taken down by means of
12 Stenograph notes, reduced to typewriting under my
13 direction and is a true record of the testimony given
14 by said deponent and was thereafter presented to the
15 deponent for signature.16 I do further certify that I am a disinterested
17 person in this cause of action; that I am not a
18 relative or attorney of any of the parties or
19 otherwise interested in the event of this action and
20 am not in the employ of the attorneys for the
21 respective parties.22 IN WITNESS HEREOF, I have hereunto set my hand
23 and affixed my notarial seal this 22nd day of
24 October, 2018.25
16 *Paula Morgan*
1718

Paula A. Morgan, Notary Public

19 County of Residence: Hamilton

20 My Commission expires: October 9, 2024

BERNARD L. FRAGA, PH.D.
STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

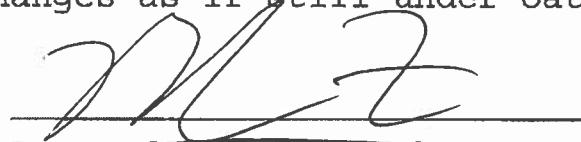
October 17, 2018
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1 Reference No.: 2949500
2
3

4 Case: STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.
5
6

7 DECLARATION UNDER PENALTY OF PERJURY
8
9

10 I declare under penalty of perjury that
11 I have read the entire transcript of my Depo-
12 sition taken in the captioned matter or the
13 same has been read to me, and the same is
14 true and accurate, save and except for
15 changes and/or corrections, if any, as indi-
16 cated by me on the DEPOSITION ERRATA SHEET
17 hereof, with the understanding that I offer
18 these changes as if still under oath.
19

20 
21 ~~Bernard L. Fraga, Ph.D.~~
22

23 NOTARIZATION OF CHANGES
24 (If Required)

25 Subscribed and sworn to on the _____ day of
26
27 _____, 20____ before me,
28

29 (Notary Sign) _____

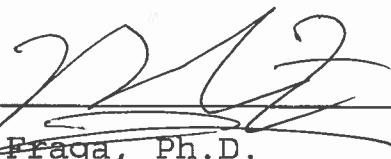
30 (Print Name)

31 Notary Public,

32 in and for the State of _____

BERNARD L. FRAGA, PH.D.
STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

October 17, 2018
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1 Reference No.: 2949500
2 Case: STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.
3 Page No. 23 Line No. 24 Change to: _____
4 I'm trying to clarify "set forth in the report." Is it
5 Reason for change: Incorrect stenography
6 Page No. 27 Line No. 1 Change to: _____
7 form of undercount that I was interested in that
8 Reason for change: Incorrect stenography
9 Page No. 45 Line No. 25 Change to: _____
10 sentence, "it requires all households to list." So I'm
11 Reason for change: Incorrect stenography
12 Page No. 50 Line No. 2 Change to: _____
13 is "yes, will participate" -- to question 1, no longer
14 Reason for change: Incorrect stenography
15 Page No. 56 Line No. 4 Change to: _____
16 But if we think that, it is plausible that the
17 Reason for change: Incorrect stenography
18 Page No. 62 Line No. 5 Change to: _____
19 Section 5.1.2, page 12, I describe Scenario B.
20 Reason for change: Incorrect stenography
21 Page No. 76 Line No. 10 Change to: _____
22 different demographic groups, by race, ethnicity, some
23 Reason for change: Incorrect stenography
24
25 SIGNATURE:  DATE: 11/17/2018
Bernard L. Fraga, Ph.D.

BERNARD L. FRAGA, PH.D.
STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

October 17, 2018
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1 Reference No.: 2949500

2 Case: STATE OF CALIFORNIA vs WILBUR L. ROSS, JR.

3 Page No. 77 Line No. 13 Change to: _____

4 Population Estimates Program estimates. The ACS

5 Reason for change: Incorrect stenography

6 Page No. _____ Line No. _____ Change to: _____

7 _____

8 Reason for change: _____

9 Page No. _____ Line No. _____ Change to: _____

10 _____

11 Reason for change: _____

12 Page No. _____ Line No. _____ Change to: _____

13 _____

14 Reason for change: _____

15 Page No. _____ Line No. _____ Change to: _____

16 _____

17 Reason for change: _____

18 Page No. _____ Line No. _____ Change to: _____

19 _____

20 Reason for change: _____

21 Page No. _____ Line No. _____ Change to: _____

22 _____

23 Reason for change: _____

24 SIGNATURE:  DATE: 11/17/2018

25 Bernard L. Fraga, Ph.D.

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2
3
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6
7
8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

10 STATE OF CALIFORNIA, *et al.*,

11 Plaintiffs,

12 v.

13 WILBUR L. ROSS, JR., *et al.*,

14 Defendants.

16 CITY OF SAN JOSE, *et al.*,

17 Plaintiffs,

18 v.

19 WILBUR L. ROSS, JR., *et al.*,

20 Defendants.

Civil Action No. 3:18-cv-01865-RS and
Civil Action No. 3:18-cv-02279-RS

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION IN LIMINE
TO EXCLUDE TESTIMONY OF DR.
MATTHEW BARRETO PERTAINING
TO QUESTION 8 OF HIS SURVEY**

Dept.: 3

Judge: The Honorable Richard G. Seeborg

Trial Date: January 7, 2019

Action Filed: March 26, 2018

22 Upon consideration of Defendants' Motion *in Limine*, and any objections thereto, it is
23 hereby ordered that the Motion is GRANTED. It is further ORDERED that any testimony or
24 evidence of Plaintiffs' expert witness, Dr. Matthew Barreto, pertaining to Question 8 of his survey
25 or the results therefrom is excluded from the trial.

26 Dated: _____

27 _____
28 Honorable Richard Seeborg